Appeal No. **SC93195**

In The

SUPREME COURT OF MISSOURI

CITY OF KANSAS CITY, MISSOURI

Plaintiff/Respondent

vs.

KAREN CHASTAIN ET AL.

Defendants/Appellants

Appeal from the Circuit Court of
Jackson County, Missouri
Case No. 1116-CV29139

APPELLANT'S SUBSTITUTE REPLY BRIEF

Jeffrey J. Carey
Missouri Bar No. 46156
229 SE Douglas Street, Suite 210
Lee's Summit, MO 64086
(816) 246-9445
(816) 246-8006 FAX
carey@carey-lawfirm.com

Attorney for Appellant

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I. Introduction

As fully set forth in Appellant's Substitute Brief, the proposed ordinance at issue is not facially unconstitutional. It is equally important, however, for the Court to recognize that a ruling to the contrary has broad public interest implications. The scope of pre-election review of initiative petitions is intentionally narrow and they are construed liberally in order to preserve the people's right to directly legislate and participate in their democracy. The sacrifice of these principles to strike down an initiative petition that the City of Kansas City, Missouri can repeal with a single vote would be short sighted.

II. Argument

1) The proposed ordinance is a legislative, not administrative, ordinance and the City should be precluded from making the argument that it is administrative as this issue was not plead, tried or briefed at the Western District Court of Appeals

The City alleges that the Appellant has altered the basis of a claim raised in the Court of Appeals in contravention of Rule 83.08(b). As will be fully briefed in Appellant's suggestions in opposition to the City's motion to strike, the Appellant has not raised any new arguments (including the

argument that the inclusion of a directive to seek federal funding satisfies the funding requirement of Article III, Section 51) but has merely emphasized some arguments and re-organized its arguments to make them clearer to this Court. The City, after filing that motion, has asserted that the proposed ordinance is administrative in nature and, therefore, that is suffers from a procedural defect that is subject to pre-election review. Respondent's Substitute Brief at 16-17. This is an entirely new ground for pre-election review that was not plead, proven, or previously argued. LF at 6-17 (petition); Transcript pp. 1-20; Respondent's Brief. There are at least two problems with the Court entertaining this argument. First, parties are estopped from raising new issues on appeal that were not raised at the trial court level. *Roy v. Missouri Dept of Corr.*, 23 S.W.3d 738 (W.D. Mo. 2000) *quoting Walker v. Walker*, 954 S.W.2d 425, 428 (Mo. App. 1997). The City's sole assertion has always previously been that the proposed ordinance violates the Missouri Constitution, Article III, Section 51. Second, this issue was not raised in Respondent's Brief before the Missouri Court of Appeals and advancing it now violates Rule 83.08(b).

The Respondent, furthermore, fails to cite to any case holding that an initiative to create sales tax revenues for a particular purpose that also contemplates application for federal matching funds is administrative in

nature. In *Gateway* the initiative petition sought to compel the City to write letters to the federal government urging the labeling of genetically modified foods and is inapposite. The Respondent also cites to an Oregon case, *Yerkovich*, which dealt with an initiative directing the City of Portland to try to compel the State of Oregon and the federal government to build a particular federal highway project. Neither were sales tax initiatives raising funds for a particular purpose and are not instructive to this Court. The imposition of a tax is a quintessential legislative function. *See generally* State ex rel. *Carpenter v. St. Louis*, 2 S.W.2d 713, 318 Mo. 870 (Mo. 1928) ("The function of specifying the rate of taxation is a legislative function which the General Assembly must itself exercise for state purposes, but which may be delegated to the "corporate authorities" of municipalities for local purposes."); *see also* R.S.Mo. Chapter 144.

2) The proposed ordinance is not facially unconstitutional.

The Committee of Petitioners fully briefed the issue of the constitutionality of the proposed ordinance and those arguments will not be re-hashed here. An analysis of the City's position, however, merits closer examination. The City states that "Appellants freely admit that their ordinance does not provide all of the necessary funding…" Respondent's Brief, p. 12 *see also* p. 13, ¶2. Their supposed support for this statement is

the fact that the Appellants acknowledged that the sales tax revenue would need to be securitized in order to obtain immediate capital. As argued below, the City could also utilize other tactics to build the system as sales tax revenues are received. The Appellants informed the trial court that "If the Court takes up this argument [regarding allegedly insufficient revenues] the Defendants will be retaining expert witnesses to form an opinion regarding the cost of building the system and/or pieces of the system contemplated by the ordinance. In addition, an economist will need to be retained to express an opinion regarding the sales tax revenues that will be generated by the proposal." Motion to Dismiss for Lack of Subject Matter Jurisdiction, L.F. at 47. For timing and other reasons, the Committee elected not to pursue this course of action at the evidentiary hearing but the City, likewise, did not adduce any competent evidence of the cost of the system or the revenues that would be produced.

As the proposed ordinance is devoid, on its face, of information from which the court could calculate the amount of revenue produced by the taxes proposed or the cost of the system, the City is left with arguments that the language states that the sales tax should be used "to help fund" the improvements and that the City should use the sales tax revenue to "finance bonds and secure federal matching funds." One cannot conclude that the

sales tax revenue is insufficient without resorting to extrinsic evidence regarding the revenues and costs of the system. This is especially true when the language of the proposed ordinance is liberally construed in favor of constitutionality. *Knight v. Carnahan*, 282 S.W.3d 9, 15 (W.D. Mo. 2009) .

Article III, Section 51 provides that "The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby…" The proposed ordinance clearly creates revenues. It also provides, through the guidance to seek federal funding, for an additional new revenue source to supplement the sales tax revenue. How, then, can the City argue that the Appellants did not "create and provide for" the necessary revenues?

Presuming that the Court believes that only municipal tax revenues are the type of revenues contemplated by Section 51, the question then becomes whether or not the proponents' instruction to the City to seek other revenue sources explicitly acknowledges that said sources will be necessary. It should not be unconstitutional for the proponents to consider all available sources of revenue and provide that these should be utilized to make the system as good as it can be. It is somewhat inconceivable, in fact, that a light rail system would be constructed by a municipality without attempting to utilize federal sources of revenue. There would be nothing stopping the

committee member themselves, furthermore, from directly appealing to Congress for matching funds presuming a dedication of sales tax with which to apply for a match. If these revenue sources do not materialize, however, the City still has a substantial revenue source from the sales tax with which it can construct the system.

It is also important to note that the proposed ordinance does not give a deadline for completion of the project and that sales tax revenues are being dedicated, for the next 25 years. Proposed Ordinance, Exhibit 104. While it is true that securitization would be necessary to turn a future revenue stream into present capital with which to construct the project, this is not the City's only option. Rather than seeking bonds to obtain immediate capital, the City could also invest the funds as they came in, until sufficient funds were available. In order for the Court to determine that this tactic cannot be used to generate sufficient revenues in a decade, or two decades, more information would be needed regarding potential rates of return on investments as well as the inflationary or deflationary trends in light rail system construction. How can the City, today, conclude that the dedicated sales tax revenues will be insufficient if the funds are invested for a decade or two with the interest being compounded and reinvested?

The City points out, correctly, that it is required by the Missouri Constitution to keep a balanced budget. If the ordinance is passed, therefore, the City will need to calculate the costs of the system and determine whether or not the projected revenue from the provided sales tax will be sufficient to construct the proposed route. If there is a shortfall, the ordinance requires the City to seek federal matching funds to complete the construction. The City *may* also choose to debate whether or not other sources of funds can be made available to meet the expressed will of the people. The City *may* choose to repeal the measure and enact a scaled down version in order to meet the desire of the electorate as fully as possible. The City *may* choose to invest the funds until there is sufficient funding for the system. If the system cannot be built either solely on the sales tax revenue or with augmenting funds, then the vote to repeal would presumably be used by the City to ensure that its budget remains in balance. This check in the system is sufficient to ensure that the proposal does not cause the City to "become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years…" Missouri Constitution, Article VI, section 26(a). The City's administration and government clearly do not *want* do undergo the due diligence that would be required by a second affirmative vote for light

rail in Kansas City but "all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Missouri Constitution, Article I, Bill of Rights, Section 1.

Should the proponents be penalized for including language that would provide for additional revenue sources that will enhance the system? If the proponents had not taken this step there would be no possibility, in the undersigned's opinion, that a facial defect would be present. The matter would be submitted to the voters and then the same due diligence would need to be conducted by the City. The proponents, however, wanted to be sure to instruct the city to seek all available funding sources in order to provide the best possible public transportation and return on the voters' investment of their sales tax revenue.

The City, apparently, is not in favor of light rail and it can make an argument that the construction of such a system would be a burden on the City. However, the "Courts do not sit in judgment on the wisdom or folly of proposals." *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo., 1990). Before enactment, in this case, the Court must necessarily sit in judgment of the revenues and costs of the proposed ordinance in advance of an affirmative vote by the people. How does the appellate or trial court propose to calculate the revenues and costs from this

system *prospectively*? Facts change over time. Revenue projections on the date of any potential enactment may be drastically different than today's revenue projections. Technological advancements or changes in the cost of commodities or labor may drastically alter the cost of construction. Until that analysis is complete, if the measure is passed, the Court and parties are left only with speculation and supposition. This is not a sufficient basis on which to conclude, pre-election, that the subject ordinance is facially unconstitutional.

In addition, it is bad public policy for the Court to consider an expansion of pre-election review under Article III, Section 51 to include proposals with allegedly insufficient funding. The Respondent argues that the Appellants are trying to exercise their Constitutional and Charter rights to legislate by initiative petition, but have to first overcome the resources of the City's legal department at substantial cost. If pre-election review is expanded to include allegations of insufficient funding, there will be a dramatic increase in the number of such challenges and the cost of defense will create an impediment to the electoral process. How many citizens' groups could afford the legal costs of mounting a defense to the City's obstruction?

3) If the ordinance is not facially unconstitutional the Appellant's right to Mandamus is clear.

The City's sole argument in opposition to the proposition that it has a ministerial duty to place this matter on the ballot boils down to the argument that it is facially unconstitutional. The City, despite this fact, does not simply concede that if the ordinance is constitutional that they have a ministerial duty. Presuming that this Court finds that it is not facially unconstitutional, the City will absolutely be left with a ministerial duty. Section 703 of the Charter of the City of Kansas City, Missouri, provides that "Upon receipt of such certification [that the Petitioners desire the matter to be submitted to the voters despite a vote to the contrary by the Council under Section 702] the City Clerk *shall* certify the fact to the Council at its next regular meeting. The Council *shall* thereupon submit the proposed ordinance to the electors at the next available municipal or state election held not less than thirty (30) days after such certification by the committee of petitioners for which the City can lawfully provide required notices to the election authorities without seeking a court order." Plaintiff Exhibit 100 (emphasis added). Absent a finding that the proposed ordinance is facially unconstitutional, the City is without discretion to refuse to submit the matter.

The Appellants, furthermore, request that this Court order the submission of the matter to the voters pursuant to Section 703.

4) The City of Kansas City, Missouri, failed to plead or prove that it lacked an adequate remedy at law.

The standard of review cited by the Respondent states, in part, that "we will affirm the trial court's [declaratory] judgment unless there is no substantial evidence to support it…" *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 413 (Mo. Banc 2001). Where, then, is there substantial evidence in the record regarding the City's lack of an adequate remedy at law? The facts the City alleged that it plead related to the procedure followed by the Committee in order to place the City in a position where it was obligated to submit the proposed ordinance to the voters and the allegation that the ordinance did not meet the threshold requirements of the Missouri Constitution. Respondent's Substitute Brief, pp. 18-19. The City also pointed to argument sections of various briefs filed in the case in support of the assertion that it proved that it had an inadequate remedy at law. Respondent's Brief, p. 19. The portions relating to arguments made in the briefs is irrelevant to the issue of whether the City plead or proved that it had an adequate remedy at law as general statements made in briefs or in argument to the Court by

counsel, however, do not constitute substantial and competent evidence. The only relevant portion of the City's brief, in this regard, is the argument that the general allegations that the ordinance was facially unconstitutional constitute an allegation of a lack of an adequate remedy at law. The City, however, also failed to prove that it had an adequate remedy at law. Unless the Court believes that allegations of facial unconstitutionality is a sufficient allegation of a lack of an adequate remedy at law, the Respondent's Brief is devoid of citation to *evidence* presented to the Court that establishes the fact that the City lacked an adequate remedy at law. The trial court set the matter for final evidentiary hearing on February 17, 2012, and stated that "Counsel will be given the opportunity to present evidence as well as argument." L.F. at 113. The parties stipulated to certain facts in connection with that hearing. L.F. at 122-123. The City does not allege in its brief that any of the stipulated facts constitute evidence that it did not have an adequate remedy at law. Respondent's Substitute Brief, pp. 18-23. Neither party called any witnesses at the evidentiary hearing. The Defendants did not introduce any exhibits. The City, however, introduced a number of exhibits at the evidentiary hearing. *See Plaintiff City of Kansas City, Missouri's Exhibit List*, L.F. at 134-136*;* (All exhibits deposited with the Supreme Court). The City does not allege in its brief that any of the exhibits contain evidence that

the City lacked a substantial remedy at law. Respondent's Substitute Brief, pp. 18-23. At page 20-23 of its substitute brief, the City re-iterates its arguments regarding why it feels it lacks an adequate remedy at law but cites to no *evidence* on which the trial court could have reached this conclusion. The City also asserted that Appellant's statement of facts was incomplete and filed supplemental facts, yet it points to none of them as support for the proposition that it *proved* that it lacked an adequate remedy at law. As stated clearly in *Guyer*, declaratory judgment cannot be upheld by the appellate court if there is no evidence to support a necessary element of the claim. *See also Klugesherz v. American Honda Motor Co., Inc.*, 929 S.W.2d 811, 813 (Mo. App. E.D., 1996) (internal citations omitted; emphasis added) It is not the role of an appellate court, furthermore to "supply missing evidence or give [the party] the benefit of unreasonable, speculative, or forced inferences. The evidence and inferences must establish every element and not leave any issue to speculation." Id.

Though the fact that the City points this Court to no evidence of the lack of an adequate remedy at law is sufficient to overturn the trial court's verdict, the Appellant's would prefer a ruling that the proposed ordinance is not, in fact, facially unconstitutional in order to bring finality to this matter.

The City makes much of the alleged cost of holding an election. The Appellant's are not entitled to a special election. Their matter would be submitted at the next "next available municipal or state election." Charter of the City of Kansas City, Missouri § 703. The only conceivable cost to the City would be some additional ink on the ballot. When this (non-alleged and unproven) cost is compared against the right of the citizens to vote on an initiative petition endorsed by nearly five thousand voters the balance of interests is clear.

5) While it may be proper for the Court to receive some extrinsic evidence to demonstrate that there is some cost associated with an initiative petition, it is improper for the Court to receive extrinsic evidence regarding feasibility pre-election.

The City argues that the trial court did not consider Exhibit 110 when it concluded that the ordinance was facially unconstitutional. It argues that two prior cases have admitted evidence regarding the cost of proposals that were found to violate the appropriations clause. Respondent's Brief, pp. 29-30. Neither of those cases, however, contained provisions for tax revenues to support the measure. The opponent was merely producing evidence that there would be *some* cost to the government. The Appellant has never disputed that there will be some cost associated with building a light rail

system. Neither of the cases cited by Respondent, however, amount to a feasibility analysis of a proposal that was alleged to be underfunded. If the City can admit the information sheet then it (and the proponents, if they can afford it) can certainly call expert witnesses to establish the costs and revenues of a proposal that is alleged to be underfunded. If the Court is not inclined to find that the trial court relied on this evidence in reaching its ruling Appellant would urge language in this Court's opinion providing guidance regarding the proper scope of evidence to be received in a pre-election review proceeding.

III. Conclusion

The citizens that advanced this initiative process are entitled to a liberal construction of their proposed ordinance in favor of constitutionality. The proposed ordinance does not state, on its face, that the sales tax revenues will be insufficient to fund the system. It is debatable whether or not they will be sufficient, especially when the tactic of investing the sales tax revenues or deferring construction to a future date is considered. If the Court cannot answer two questions by reviewing the face of the proposed ordinance then it should not conclude that it is facially unconstitutional. 1) How much revenue, from any constitutional source provided for in the proposed ordinance, will be generated over the next 25 years? 2) How much

will it cost to construct a light rail system now or at some point in the next twenty-five years?

CERTIFICATE OF SERVICE

I certify that a copy of this Appellant's Substitute Brief was served this July 17, 2013, through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

Ms. Sarah Baxter
City Attorney's Office
2800 City Hall
414 E. 12th Street
Kansas City, MO 64106
Attorney for Respondent

/s/ Jeffrey J. Carey
Jeffrey J. Carey

RULE 84.06(c) AND (g) CERTIFICATE

I certify that this Appellant's Brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the entire brief (excepting excluded sections under 84.06(b)) contains 3451 words. The brief is in Microsoft Word Times New Roman Font, 14 point. I further certify that the electronic copy of the Appellant's Brief filed with the Court and served on the Attorney for Respondent was scanned for viruses by an anti-virus program and is virus-free according to such program.

/s/ Jeffrey J. Carey
Jeffrey J. Carey
Missouri Bar No. 46156

229 SE Douglas Street
Suite 210
Lee's Summit, MO 64086
(816) 246-9445
(816) 246-8006 FAX
carey@carey-lawfirm.com

Attorney for Appellant